In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 900

GLADYS TOWLES ROOT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner and her co-defendant, George A. Forde, are attorneys who represented John W. Irwin and Joseph C. Amsler at their trial on charges of kidnapping Frank Sinatra, Jr. In July 1964, a grand jury in the United States District Court for the Southern District of California returned an indictment charging petitioner and Forde with conspiring with Irwin and Amsler to obstruct justice and commit perjury in order to obtain an acquittal by conveying false information in and out of the courtroom that the alleged criminal acts were arranged as a publicity stunt by the victim. In addition, two substan-

tive counts charged petitioner and Forde with obstructing justice by inducing false testimony by Irwin and Amsler respectively. A motion by petitioner and Forde to dismiss the indictment was sustained by the district court on the ground that essential elements had not been charged. The district court indicated that a count charging defendants with obstruction of justice at the trial of Amsler and Irwin would not state an offense unless it set forth the false testimony verbatim, alleged that it was material, and explained its materiality to the charges against Amsler and Irwin.

On December 9, 1964, a second indictment was returned by another grand jury. This five-count indictment charged petitioner and Forde with conspiracy, suborning perjury in violation of 18 U.S.C. 1622 (two counts) and corruptly influencing witnesses in violation of 18 U.S.C. 1503 (two counts). The conspiracy count charged that the object of the conspiracy was to obtain the acquittal of Amsler and Irwin by unlawful means, and that as part of the conspiracy Amsler and Irwin would be instructed to testify falsely as to six specified material subjects (see Pet. App. 9-10). These subjects of false testimony were repeated in the obstruction-of-justice counts (4 and 5). The subornation-of-perjury counts (2 and 3) alleged that petitioner and Forde wilfully caused Amsler and Irwin to testify falsely as to such specified subjects—"material matters" which the witness "did not believe to be true"—and then set forth verbatim 134 pages of trial transcript, divided into 33 chapters. As to each matter, the indict-

ment charged: "And said testimony was false and contrary to the oath taken by John William Irwin (or Amsler), as Irwin (or Amsler), defendant Root and defendant Forde then and there well knew and believed in that * * *." A statement of the matter in its truthful form followed. At the end of each chapter was an averment that the testimony was "material to the guilt or innocence as framed by the indictment and the pleas of not guilty entered by all of the defendants in Case No. 33087-CD (Amsler's and Irwin's trial)."

On June 28, 1965, the district court once more sustained the defendants' motion to dismiss the indictment for failure to contain certain material averments—to wit, the precise testimony alleged to be false (Pet. App. C). On appeal by the government, the court of appeals reviewed each count and concluded contrary to the district court that the indictment was legally sufficient. It therefore reversed the decision of the district court. 366 F. 2d 377 (Pet. App. B).[1] Petitioner seeks review of the court of appeals' judgment.

There is, however, no occasion for further review of the indictment at this interlocutory stage. The

[1] The court of appeals had jurisdiction to entertain the government's appeal under 18 U.S.C. 3731 because the ground of the district court's ruling setting aside the indictment was deficient pleading, rather than any invalidity of the statutes upon which the various counts of the indictment were based. See *United States* v. *Borden Co.*, 308 U.S. 188.

The quashing (prior to trial) of the first indictment did not, of course, bar the returning of a second indictment which sought to cure the defects found in the first one. See *United States* v. *Oppenheimer*, 242 U.S. 85.

opinion of the court below demonstrates that each of the five counts of the indictment alleges the elements of the offense to be charged and fairly apprises the defendant of the crime intended to be alleged. *Hagner* v. *United States*, 285 U.S. 427; *United States* v. *Debrow*, 346 U.S. 374. The indictment is lengthy only because, in order to meet the prior objection by the district court, the government in the perjury counts set out verbatim more than 130 pages of the testimony alleged to be false and specified the nature of the perjury. The entire wording of the other counts —count one (conspiracy, including 18 overt acts), and counts four and five—occupies a total of seven pages. Petitioner could not be in doubt of the crimes with which she is charged.[2]

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

JANUARY 1967.

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[2] Petitioner attempts also to raise issues sought to be presented in her cross-appeal dismissed by the court below. The cross-appeal was properly dismissed because the government's appeal under 18 U.S.C. 3731 raised only the validity of the indictment as a pleading. Any other issues may be raised by petitioner on appeal from a final judgment. In any event, the exclusion of lawyers from jury duty by the district court is a valid exercise of its authority under 28 U.S.C. 1863, and the court's order excluding lawyers (Pet. App. D) properly declined to distinguish between male and female lawyers (*Ballard* v. *United States*, 329 U.S. 187).

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